

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 53

WCC No. 9411-7166

ROCKY G. ROONEY

Petitioner

vs.

CREDIT GENERAL INSURANCE

Respondent/Insurer for

TTC INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant sought medical and compensation benefits for current back condition, which insurer contended was not related to 1993 industrial accident.

Held: Although claimant has significant pre-existing back conditions, the insurer is liable for his current condition if his industrial injury lit up, aggravated or accelerated his back condition. A preponderance of the evidence establishes that the 1993 injury lit up and worsened claimant's underlying spondylolisthesis and spinal stenosis. While claimant occasionally had low back pain prior to the accident, he never sought treatment for such pain, which is now worse and radiates into his legs. Though not all physicians who have evaluated claimant recommend surgery at present, the weight of the evidence indicates surgery is a reasonable medical treatment, making the insurer liable if claimant chooses to undergo surgery. Since surgery may alleviate or diminish some of claimant's symptoms, he has not reached maximum medical healing, and is entitled to temporary total disability benefits retroactive to the date of their termination.

Topics:

Injury and Accident: Aggravation: Generally. Although claimant has significant pre-existing back conditions, the insurer is liable for his current condition if his

industrial injury lit up, aggravated or accelerated his back condition. A preponderance of the evidence establishes that the 1993 injury lit up and worsened claimant's underlying spondylolisthesis and spinal stenosis. While claimant occasionally had low back pain prior to the accident, he never sought treatment for such pain, which is now worse and radiates into his legs.

Injury and Accident: Causation. Although claimant has significant pre-existing back conditions, the insurer is liable for his current condition if his industrial injury lit up, aggravated or accelerated his back condition. A preponderance of the evidence establishes that the 1993 injury lit up and worsened claimant's underlying spondylolisthesis and spinal stenosis. While claimant occasionally had low back pain prior to the accident, he never sought treatment for such pain, which is now worse and radiates into his legs.

Medical Conditions (By Specific Condition): Spinal Stenosis. Although claimant has significant pre-existing back conditions, the insurer is liable for his current condition if his industrial injury lit up, aggravated or accelerated his back condition. A preponderance of the evidence establishes that the 1993 injury lit up and worsened claimant's underlying spondylolisthesis and spinal stenosis. While claimant occasionally had low back pain prior to the accident, he never sought treatment for such pain, which is now worse and radiates into his legs.

Benefits: Medical Benefits: Surgery. Though not all physicians who have evaluated claimant recommend surgery at present, the weight of the evidence indicates surgery is a reasonable medical treatment, making the insurer liable if claimant chooses to undergo surgery. Since surgery may alleviate or diminish some of claimant's symptoms, he has not reached maximum medical healing, and is entitled to temporary total disability benefits retroactive to the date of their termination.

Benefits: Temporary Total Disability Benefits. Though not all physicians who have evaluated claimant recommend surgery at present, the weight of the evidence indicates surgery is a reasonable medical treatment, making the insurer liable if claimant chooses to undergo surgery. Since surgery may alleviate or diminish some of claimant's symptoms, he has not reached maximum medical healing, and is entitled to temporary total disability benefits retroactive to the date of their termination.

The trial in this matter was held on January 24, 1995, in Missoula, Montana. Petitioner, Rocky G. Rooney (claimant), was present and represented by Mr. Mark E. Westveer. Respondent, Credit General Insurance (CGI), was represented by Mr. Michael P. Heringer. Claimant, Darryl Graham, Jim Hinds and Linda Rooney testified. Additionally,

the depositions of claimant, Dr. Robert F. Moseley, Dr. William S. Shaw and Dr. Michael Lahey were submitted for the Court's consideration. Exhibits 1 through 9 were admitted by stipulation of the parties. A transcript of the trial has not been prepared.

Issues Presented: Claimant asks this Court to determine that his January 12, 1993 industrial injury caused his current back condition. He seeks medical and compensation benefits. In addition, he requests that he be awarded attorney's fees and costs.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was forty-four (44) years old. He is a high school graduate.
2. In 1977, claimant began a career of truck driving. (Rooney Dep. at 10.) He has worked for a variety of trucking operations and driven flatbeds, chip trucks, and double A-trains. He has primarily worked as a long-haul truck driver, although he has also driven local delivery routes.
3. Claimant went to work for Americana Expressways (Americana) in February of 1987. Americana leased its drivers, including claimant, to other trucking companies.
4. Claimant temporarily left Americana in 1990 because he was tired of constantly being on the road. In April of 1990, he worked for a short period at Lanham's Heating & Air Conditioning (Lanham's) installing duct work and furnaces while he attempted to find another job. (Rooney Dep. at 13-14.) Darryl Graham is the owner of Lanham's and a neighbor of the claimant. Claimant worked for Molerway Freight from July to December of 1990, doing local deliveries. Claimant then went back to Americana because of better pay.
5. Americana became TTC, Inc.
6. On January 12, 1993, while working for TTC, claimant injured his back in Portland, Oregon. He was pulling a two hundred (200) pound tailgate to the rear of his trailer when he slipped on some ice and fell. The tailgate landed on top of him. He felt immediate, severe pain in his back.
7. At the time of the accident, TTC was insured by CGI, which accepted liability for the accident.

8. Following the accident, claimant worked for another couple of days. He drove to Salt Lake City and picked up another load and then returned home with the load to Lolo, Montana. Due to the pain in his back, he did not complete delivery of the load, which was destined for some other place. Another driver completed the delivery.

9. Upon return home to Lolo, claimant initially sought treatment from his wife's massage therapist.

10. Claimant had occasional backaches over the years prior to 1993, but nothing that required medical attention. (Rooney Dep. at 36.) Prior to January of 1993, he had never seen a doctor for back problems. (Rooney Dep. at 36.)

11. Massage therapy did not relieve claimant's pain and on January 19, 1993, he sought treatment at NOW CARE which is part of the Western Montana Clinic. He was examined by Dr. R. A. Breitenbach. (Ex. 1 at 6.) At that time he had moderate to severe low-back pain "which radiate[d] down the lateral aspect of the thighs, nearly to the knees bilaterally." (*Id.*) Dr. Breitenbach diagnosed "low back strain" but suspected a "[p]ossible herniated disk." (*Id.* at 7.) He prescribed physical therapy to commence "after the first several days if improving." (*Id.*)

12. Claimant began physical therapy on January 22, 1993, and continued with therapy until February 23, 1993. (Ex. 1 at 8-21.) The therapist's notes for that period document low-back pain and leg pain. The notes do not record complaints regarding the upper back or upper extremities.

13. On January 29, 1993, claimant returned to Dr. Breitenbach complaining of continued back pain and pain and numbness in his right leg. (Ex. 1 at 5.) The doctor diagnosed "[l]umbar radiculopathy" and ordered a CT scan and follow-up with an orthopedic surgeon. (*Id.*)

14. Dr. Robert Moseley, an orthopedic surgeon, examined claimant on February 10, 1993. (Ex. 1 at 4.) He took a history which provided the following details concerning claimant's back complaints:

43 YO truck driver who sustained a sudden pain in the lower back while lifting a tailgate at work on January 12, four weeks ago. He has a history of occasional mild low back pain over the years but nothing severe. Present pain worsened over the first week or so, began radiating into both legs, the R. somewhat more than the L., felt diffusely through the leg but especially down the lateral side and the lateral aspect of the calf. He has no distal paresthesias. Pain is increased with bending and lifting. It is eased by rest. It is not especially affected by walking, although he says he does get some

pain if he walks a very long distance. Pain frequently wakes him in the middle of the night. He has received PT with some relief.

(*Id.*)

15. Dr. Moseley reviewed the CT scan and plain x-rays. He found spondylolysis at the L5-S1 level. (*Id.*) His further diagnosis was:

Dx: Acute lumbosacral strain superimposed on a pre-existing first degree spondylolisthesis at L5, S1. Incidental findings of relative spinal stenosis at L4-5 due to spurs are noted on the CT scan which appear unrelated to his present symptoms. Pain in the leg appears to be entirely referred pain from the lumbosacral area.

(*Id.*) In his review of the CT scan and x-rays, Dr. Moseley also noted the presence of "first degree spondylolisthesis at the L5, S1 . . . a fairly prominent posterior spur at L4-5 . . . mild generalized degenerative disk disease and in the lower thoracic spine evidence of an old shoreman's epiphysitis." (*Id.*) He found no evidence of a ruptured disk and prescribed continued physical therapy and weight loss. (*Id.*)

16. Spondylolisthesis is the "forward displacement of one vertebra over another, usually of the fifth lumbar over the body of the sacrum." Dorland's Illustrated Medical Dictionary (27th Ed.). Spinal stenosis is "a narrowing of the spinal canal, either from bony spur formation or from soft tissue hypertrophy." (Moseley Dep. at 18.) Spondylolysis in the case of claimant "is a defect in the bone at L5." (*Id.* at 11.) In dictionary terms, it is the "dissolution of a vertebra." Dorland's Illustrated Medical Dictionary (27th Ed.). Dr. Moseley testified that the spondylolysis, spondylolisthesis, bone spurs, and degenerative disk disease preexisted claimant's injury. (Moseley Dep. at 12-17.)

17. Claimant continued his physical therapy. Between February 11 and February 18, 1993, the physical therapy notes reflect that his primary complaints were low-back pain with some right leg discomfort. (Ex. 1 at 10-15.)

18. On February 22, 1993, claimant reported to his physical therapist that he had experienced an increase in cramping and low-back soreness "primarily due to shoveling snow." (Ex. 1 at 9.)

19. On February 24, 1993, claimant returned to Dr. Moseley much improved. (Ex. 1 at 3A.) Dr. Moseley noted that shovelling snow had aggravated his pain but that over all he was "getting along pretty well." He released claimant to return to work as a truck driver on March 1, 1993. (*Id.*)

20. Claimant did not return to work on March 1 and sought additional treatment from Dr. Moseley on March 11, 1993. (Ex. 1 at 3.) At that time he had "marked paravertebral spasm bilaterally." (*Id.*) Claimant reported that he had "developed severe low back spasm today after stacking brush at home yesterday and taking a long walk today." (*Id.*) Dr. Moseley prescribed Norgesic Forte and bed rest. (*Id.*)

21. Dr. Moseley saw claimant in a follow-up visit on March 23, 1993. (Ex. 1 at 2.) He noted that claimant had "improved", although he was complaining of "persistent pain in the right leg." (*Id.*) He prescribed two (2) more weeks of Norgesic and rest. (*Id.*)

22. On April 6, 1993, Dr. Moseley saw claimant for the last time. (Ex. 1 at 1.) Claimant had full range of motion without significant pain. He had no palpable spasm or visible splinting. Dr. Moseley concluded that claimant had returned to his preinjury condition because he had full range of motion without pain and had no objective findings of either spasms or splinting. (Moseley Dep. at 30.) Dr. Moseley released claimant, without restriction, to return to work as a truck driver. He did not recommend that claimant seek a different occupation. (*Id.*)

23. Dr. Moseley told claimant that he should return for treatment if he had continuing problems. Claimant never returned to Dr. Moseley.

24. Claimant did not seek medical attention between April 6 and October 27, 1993.

25. TTC went out of business in February of 1993. (Rooney Dep. at 16.) Drivers for TTC were generally absorbed by PFT, otherwise known as Prefabrication Transportation, which is another trucking firm. Claimant filled out an application for employment with PFT after he was released by Dr. Moseley but initially was not hired. However, in early May, claimant received a letter from PFT's president, Donald Orr, asking him to come back to work and explaining that there had been a mix-up. (*Id.* at 17.) Claimant testified that he did not respond to Mr. Orr's offer of employment because Dr. Moseley had told him to find a different line of work. (*Id.* at 19.) The testimony is in conflict with that of Dr. Moseley and the Court did not find this part of claimant's testimony credible.

26. Claimant filed for and received unemployment benefits for the week of April 10, 1993 (Ex. 8), even though he was still receiving workers' compensation benefits. Part of the Unemployment Insurance file has been lost and claimant testified that in a work search application he wrote that he had been told not to return to trucking and that he had also indicated that he had a workers' compensation claim. The Court notes, however, that on the unemployment questionnaire that is available for the week of April 10, 1993, that claimant answered "yes" to the question whether he was physically able to work this week, and answered "no" to a question asking if he had received any compensation other than wages or pensions for the week." (Ex. 8.)

27. Claimant continued to receive unemployment benefits through the week of July 17, 1993. (Ex. 8.)

28. Claimant testified at deposition that he did not work until July of 1993, at which time he went to work for Lanham's. (Rooney Dep. at 42.) At trial he testified that he started working for Lanham's in May but was in training and paid no wages until July. In a "Work Activity Report" filed on September 10, 1993, in connection with an application for social security disability benefits, claimant stated that he started working at Lanham's as a sales rep in May of 1993, and that he was still working. (Ex. 2 at 156.) However, he also indicated that he had earned only \$302.62 gross since May. (*Id.* at 156, 159.)

29. Claimant filed an application for social security disability benefits on September 10, 1993. (Ex. 2 at 156.)

30. At the request of the Social Security Administration, claimant was examined on October 27, 1993, by Dr. James R. Burton, who is an orthopedic surgeon. (Ex. 1 at 36.) At the time of his examination, claimant's complaint was "low back pain with radiation into the right lateral thigh." (*Id.*) Claimant told Dr. Burton that he had not worked since the time of the accident even though he had been employed at Lanham's. (*Id.*) Dr. Burton's record contains no complaints of cervical pain, headache, bladder dysfunction or upper extremity problems. (*Id.* at 36-37.)

31. Following his examination of claimant and a review of claimant's x-rays from February 1993, Dr. Burton determined that claimant "is unable to do any work which requires any frequent stooping or bending, heavy lifting, etc." (Ex. 1 at 37.) He recommended that claimant lose weight (claimant is 5' 8½" tall and weighs 218 pounds) and exercise. (*Id.* at 36-37.)

32. Dr. Burton referred claimant to Dr. Michael Lahey, an orthopedic surgeon, for further evaluation. (Ex. 1 at 40.) Dr. Lahey examined claimant on December 29, 1993. (*Id.*) By way of history, claimant related that prior to January 12, 1993, he had only an occasional backache. He told Dr. Lahey about his accident and Dr. Moseley's treatment:

Symptoms did calm down somewhat but he has constant low backache, associated with stiffness in the morning, better during the day, worse again in the evening. Back pain is occasionally sharp with pain into [the] buttocks, currently right greater than left. Pain shoots down posterior thigh into the lateral calf, occasionally over lateral and medial aspects of right foot. He also gets occasional sharp pain into the medial aspect of the left ankle.

(*Id.*) Claimant also reported that he was having difficulty with bladder control, headaches and neckaches after sitting a short time, and a tingling sensation in his right hand. (*Id.*)

This is the first documentation of hand tingling, headaches, neckaches and bladder problems. Dr. Lahey's exam of claimant's upper extremities showed a positive Tinel's at the distal flexor crease for proximal paresthesia and diminished sensation of the median nerve sensation distribution. (*Id.* at 41.) For the first time, physical examination of the claimant revealed hyperreflexia at the patella (*Id.* at 41), a finding which could indicate a central nervous system abnormality. (Lahey Dep. at 16-17.)

33. Dr. Lahey referred claimant to Dr. R.S. Munro, a urologist, then to Dr. Henry Gary, a neurosurgeon in an attempt to determine the cause of claimant's bladder dysfunction. (Ex. 1 at 34- 35, 41-43.) To date, the cause has not been determined. In any event, it appears unrelated to claimant's low-back condition.

34. On February 22, 1994, Dr. Lahey recorded that claimant's stenosis goes as high as L2. (Ex. 1 at 42.)

35. Dr. Lahey recommended on February 23, 1994, that claimant undergo decompression laminectomies at four (4) levels, L2-3, L3-4, L4-5, L5-S1 with arthrodesis. (Ex. 1 at 42.) An arthrodesis is "the surgical fixation of a joint by a procedure designed to accomplish fusion of the joint surfaces by promoting the proliferation of bone cells", Dorland's Illustrated Medical Dictionary (27th Ed.) i.e., a fusion.

36. Thereafter, on October 17, 1994, claimant experienced an episode of walking difficulty. (Ex. 1 at 38-39.) "He felt like one part of his body was moving one way and one was moving another way. When he stepped he felt like he was not sure where he was stepping. He describes it as a cartoon type walk." (*Id.* at 39.) Dr. Lahey, who examined claimant on October 17th, also noted that claimant was experiencing numbness from the waist down. (*Id.*)

37. Dr. Aaron Sable, a physiatrist who examined claimant on November 7, 1994, at the request of Dr. Lahey, reported at that time that claimant had experienced "falling episodes, balance problems, . . . nervousness and anxiety." (*Id.* at 47.)

38. Dr. William Shaw, who specializes in occupational medicine, performed an independent medical examination on December 9, 1994. He reported claimant's symptoms as including "bilateral arm pains as well as transient numbness of the left side of the face," upper back pain, and dropping things. (*Id.* at 54, 56.)

39. Claimant stopped working for Lanham's in September 1993. He has not worked since.

40. Neighbors of claimant testified credibly that ever since claimant's industrial accident they have observed a decline in his activities.

41. Claimant has not undergone the surgery recommended by Dr. Lahey because CGI has refused to authorize the surgery. It has also refused to pay claimant any additional compensation benefits.

42. CGI takes the position that claimant's January 12, 1993 industrial accident temporarily aggravated his underlying back conditions and that he reached maximum healing on April 6, 1993. It denies that he suffered any permanent consequence on account of the injury and urges that the surgery recommended by Dr. Lahey is wholly on account of his preexisting conditions. It also questions the need for the surgery.

43. I find by a preponderance of medical evidence, as well as by a preponderance of all evidence, that claimant's January 12, 1993 industrial accident permanently aggravated his preexisting back conditions. Certainly, not all of claimant's symptoms are related to his back condition, and he may be suffering from a concurrent condition such as cervical myelopathy or a central demyelinating process (Ex. 1 at 61), but there is persuasive evidence that many of his symptoms are the result of his industrial accident and that surgery is reasonable medical treatment for those symptoms. The following facts and testimony are important to these findings:

a. While conceding that not all of claimant's symptoms are related to his back, and that further evaluation of his unrelated symptoms is warranted, Dr. Lahey expressed the opinion that many of claimant's symptoms are related to his back, specifically to his spinal stenosis and spondylolisthesis, and that he has not reached maximum medical improvement. (Lahey Dep. at 34-44, 49-52, 58-61.)

b. Dr. Lahey related the onset of those symptoms to claimant's industrial accident. He explained it this way:

The spinal conditions or deformities or specific areas of concern with Mr. Rooney are present in a certain percent of the population that do not have symptoms. For instance, spinal stenosis is a condition that involves narrowing of the spinal canal and may not be associated with symptoms up until a certain point. At which time, more likely than not, people do have symptoms.

Again, degenerative change or aging changes occur throughout life and may or may not be associated with symptoms. The slippage of one vertebra on another does not necessarily correlate with symptoms and, in fact, a vast majority of people do not have symptoms. But when they do occur, they do follow certain patterns of symptoms in each of these conditions.

So the fact that my testimony implicates his symptoms as starting with a particular injury is based upon the history of his symptoms beginning and correlates, therefore, with my opinion that because his symptoms began with that injury and there's no data that I have been able to find that he was having similar symptoms prior to that, then the basis of medical testimony attributing an injury to a particular event, I believe, is -- is the only basis that we have and would be considered within the best estimate of medical certainty that a specific injury caused a specific problem.

(Lahey Dep. at 55-56.)

c. Dr. Lahey took into consideration the fact that claimant's condition had improved in April 1993 and he had been declared maximally healed by Dr. Moseley:

Four [sic] a particular set of symptoms to be related to a previous injury, the patient should, in my opinion, have the same set of symptoms, or similar set of symptoms in the same locations, as they had felt at the time or shortly thereafter that injury.

It is not infrequent for spine conditions to have periods where they either improve or deteriorate and subsequently improve. So there is a variation in the symptoms according to usual activity, sometimes medication, sometimes therapy or other modalities that are used to decrease symptoms.

(Lahey Dep. at 57.)

Q. And I'm going to represent to you, Doctor, that Dr. Moseley further testified that Mr. Rooney had reached a point of maximum healing. His strain had completely resolved, he could not attribute any impairment to Mr. Rooney, and he released him to his truck driving position without restriction. And this is based upon his deposition testimony.

Does that in any way affect your opinions on relating Mr. Rooney's symptoms to the January 12th, 1993, injury, if you assume those facts?

A. No, it does not.

Q. And why is that?

A. In my practice, it's not uncommon for people to improve to a certain state where they're less symptomatic. To me, that does not prove that they won't have recurrent symptoms, nor does it prove that they are capable of returning to certain levels of activity, unless that has been documented.

The fact that he had had significant muscle spasm, as documented by Dr. Moseley, and was having acute symptoms and had, on one occasion, felt better, had better motion, does not indicate that he had reached maximum medical improvement, which in my practice relates to the ability -- or relates to the fact that he has regained as much mobility, physical endurance or tolerance as he is likely to get, nor does it document whether he will have ongoing symptoms if he returns to that particular -- a particular activity.

(*Id.* at 58-59.)

d. Dr. Moseley initially released claimant to return to work on March 1, 1993. Claimant then suffered a setback.

e. While it was Dr. Moseley's opinion on April 6, 1993, that claimant had reached maximum healing and had suffered no permanent consequence of his injury, Dr. Moseley conceded that if claimant continued to experience pain thereafter he would conclude that claimant had permanently aggravated his underlying back condition:

Q. . . . If someone is essentially asymptomatic for back pain up to a point where they have an injury -- it's not a real severe injury, but an injury nonetheless -- but they end up having the back pain that Rocky had initially when he saw you, and then over time the back continues to give him more and more pain, is it medically more probable than not that that particular trauma, such as Rocky experienced, either aggravated or accelerated the condition that is explained in those reports?

A. You're trying to put words in my mouth.

Q. No --

A. I'm sorry.

Q. Explain it how you would.

A. I was with you right till the end. It is more medically probable than not, yes, that the injury aggravated or exacerbated the back pain or symptoms, but it is not related to say that it increased the physical findings of these imaging studies.

Q. Okay. I think I understand you.

A. Because the imaging studies may be unrelated to his back pain --

Q. Oh.

A. -- with the exception of the spondylolisthesis, which we feel statistically and scientifically probably is related. So the injury can be said to aggravate the situation which has been created by the presence of the spondylolisthesis, but whether or not the injury aggravated the degenerative disk disease is very difficult to say.

Q. If I understand what your response is, is it medically more probable than not that his injury aggravated his spondylolisthesis?

A. Yes, and it is more probable than not that it aggravated his back pain condition, but not necessarily what has been found on these imaging studies.

Q. So if I understand you, the injury is medically more probable than not -- has to do with the symptoms he's experiencing, but the structural changes may not have been affected by the injury that he sustained; is that what you're saying?

A. Exactly, exactly.

(Moseley Dep. at 47- 48.)

This testimony supports Dr. Lahey's explanation.

f. While claimant's back pain was much improved in April 1993, over the next four months his pain in fact returned and worsened.

g. Dr. Shaw, who is critical of the proposed surgery and argues that additional testing is needed before he can form an opinion as to whether any of claimant's symptoms are related to his back or his industrial accident, agreed that claimant's symptoms in December 1993 were similar to his symptoms immediately following his industrial accident. (Shaw Dep. at 40.)

h. Dr. Shaw also agreed that if claimant had limited his activities, he could very well have felt better after his industrial accident. (Shaw Dep. at 45.)

i. Dr. Shaw, who testified by deposition, did not express the opinion that claimant did **not** permanently aggravate his back condition. He merely testified that he did not have enough information to express an opinion one way or the other. When asked whether claimant's preexisting conditions were aggravated by his industrial injury, Dr. Shaw responded:

Mr. Heringer, you're asking a very difficult question, and I hesitate because I have some significant suspicion that this man has problems other than in his low back, and I'm not clear to the extent that those other conditions outside the low back may not be, at least in part, contributing to his present symptoms of low back difficulties.

So until I can become clear as to number one, whether there are other conditions present, and number two, whether those conditions are such that they might be contributing to the low back, I have difficulties sorting out how much of his present low back symptoms are the direct result of his January '93 injury versus something else.

(Shaw Dep. at 21-22.) Dr. Shaw suggested additional testing. Why that testing was not undertaken so Dr. Shaw could formulate an opinion is not explained.

j. Claimant's symptoms arose at the time of his industrial accident and have persisted since then.

44. The Court has given no weight to Dr. Reynolds' opinion that claimant's industrial injury did not permanently aggravate his preexisting low-back condition. (Ex. 9.) Dr.

Reynolds did not testify or examine claimant. His opinion was based on the lack of any documentation of any structural changes:

Because the work injury is not documented as causing any structural damage, it is my opinion that the proposed surgery is wholly for the pre-existing condition and not related to the work injury. While it may be true that he was more symptomatic after the work injury, at this point the documented work-related soft tissue injury would be likely healed and his ongoing symptoms related to the pre-existing condition.

(*Id.*) Under Montana law, aggravation can be proven without proof of underlying structural changes. It is sufficient that a preexisting disease or disability is "lit up, aggravated or accelerated by an industrial injury." *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133 (1958). There was no opportunity to cross-examine Dr. Reynolds in light of this standard.

45. Dr. Lahey recommends surgery as appropriate "to attempt to decrease the symptoms that Mr. Rooney is having." (Lahey Dep. at 60.) His recommendation of surgery is supported by Dr. Reynolds (Ex. 9 at 2), although not by Dr. Shaw, who testified that the contemplated surgery is major surgery and should be done only as a last resort after additional testing is done. (Shaw Dep. at 25-26.) In his deposition, Dr. Lahey expressed agreement with Dr. Shaw's recommendations concerning additional testing but that did not change his opinion concerning the need for surgery. (Lahey Dep. at 43-45.) While there is an obvious difference of opinion, I am not persuaded by Dr. Shaw's testimony that Dr. Lahey's recommendation is beyond the pale of what is medically reasonable. Lacking such evidence, the Court defers to Dr. Lahey as the treating physician.

46. In light of Dr. Moseley's unconditional release of claimant to return to work in April 1993, claimant's preexisting back conditions, and claimant's lack of medical care for a period of several months, the insurer raised legitimate questions concerning the relationship of his present condition to his industrial accident. It relied on a written medical opinion stating that claimant's need for surgery is due to his underlying preexisting conditions and not to his industrial accident. It also raised legitimate concerns about the possibility of a central nervous system disorder which may be contributing to claimant's constellation of symptoms. Its decision to deny benefits was not unreasonable.

CONCLUSIONS OF LAW

1. The law in effect at the time of the claimant's injury applies in determining his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380 (1986). Since the injury occurred in January of 1993, the 1991 version of the Workers' Compensation Act applies in this case.

2. Claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). That burden extends to proof that the injury was the proximate cause of his disabling condition. *Eastman v. Transport Ins.*, 255 Mont. 262, 843 P.2d 300 (1992).

3. In this case, claimant has significant preexisting back conditions. However, the existence of a preexisting condition does not preclude compensation if the condition was aggravated or accelerated by his industrial injury.

The well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of employment. The fact that an employee is suffering from or afflicted with pre-existing disease or disability does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident. [Citations omitted.]

Robins v. Anaconda Aluminum Co., 175 Mont. 514, 518, 575 P.2d 67 (1978); accord *Roadarmel v. Acme Concrete Co.*, 237 Mont. 163, 170, 772 P.2d 1259, 1263 (1989) and *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 151, 666 P.2d 758 (1983). If the preexisting disease or condition is "**lit up, aggravated or accelerated** by an industrial injury," the worker is entitled to the benefits provided by the Workers' Compensation Act. *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133 (1958) (emphasis added).

A preponderance of medical evidence, as well as a preponderance of all evidence, see *Plainbull v. Transamerican Ins. Co.*, 264 Mont. 120,125, 870 P.2d 76, 80 (1994), establishes that claimant's January 12, 1993 industrial accident permanently lit up and worsened his underlying spondylolisthesis and spinal stenosis. Prior to the accident he had never sought treatment for low-back pain. While occasionally he had low-back pain, it was mild in nature. The injury caused great pain which radiated into his legs. That pain has persisted and Dr. Lahey attributes the onset and persistence of the pain to the industrial accident. Dr. Moseley did not refute that opinion, and in fact supported it in light of claimant's continued pain after Dr. Moseley ceased caring for claimant. Dr. Shaw did not refute the opinion, as he had no opinion. The insurer could have authorized Dr. Shaw to perform additional testing to confirm or rule out other possibilities, and thereby enable Dr. Shaw to formulate an opinion, but it did not do so.

4. Although not all physicians would recommend surgery at present, the Court is persuaded that surgery is reasonable medical treatment. CGI is therefore liable for such surgery should claimant elect to proceed with surgery.

The Court notes Dr. Lahey's endorsement of the additional testing recommended by Dr. Shaw. Dr. Lahey may wish to conduct some or all of that testing prior to undertaking surgery, but given the state of the evidence presented to the Court, the timing of that testing is a matter which must be left to claimant and Dr. Lahey.

5. Maximum healing or maximum medical improvement is "the status reached when a worker is as far restored medically as the permanent character of the work-related injury will permit." § 39-71-116(12), MCA (1991). Since surgery may alleviate or diminish some of claimant's symptoms, he has not reached maximum medical improvement and is entitled to temporary total disability benefits retroactive to the date they were cut off.

6. As found in paragraph 46 of the findings of fact, the insurer's denial of benefits was not unreasonable. Since a finding of unreasonableness is a prerequisite to an award of both a penalty and attorney fees, §§ 39-71-611 and -2907, MCA, claimant is entitled to neither.

7. Since claimant is the prevailing party, he is entitled to costs in an amount to be determined by the Court.

JUDGMENT

1. Claimant is entitled to temporary total disability benefits retroactive to the date CGI cut them off.

2. CGI is liable for the surgery proposed by Dr. Lahey should claimant elect to undergo that surgery.

3. Claimant is not entitled to a penalty or attorney fees.

4. Claimant is entitled to costs in an amount to be determined by the Court. Within twenty (20) days of this decision he shall submit a verified statement of costs. CGI shall then have ten (10) days in which to file its objections, if any.

5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 29th day of June, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Mark E. Westveer
Mr. Michael P. Heringer